

<sup>1</sup> Award at 3.

The claimant requests review of this decision alleging the ALJ erred. Specifically, claimant contends there was sufficient evidence to establish claimant's injury occurred while working for respondent thereby entitling him to benefits.

Respondent argues the ALJ was correct in his evaluation of the evidence and the Award should be affirmed in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant maintains he injured his right thumb over a series of dates from September 27 to October 8, 2001, while using a pneumatic screw gun while assembling a steel ceiling to be used in a steel building. At the December 12, 2001 preliminary hearing, the issue of compensability, specifically the cause of claimant's injury, was hotly contested. After hearing all of the evidence then available and offered by the parties, the ALJ<sup>2</sup> determined claimant was entitled to benefits and an Order was issued.<sup>3</sup> Respondent appealed this determination and the ALJ's Order was affirmed by the Board on February 19, 2002.

Thereafter, this claim was tried at a regular hearing on January 22, 2003. Not only was all the previous evidence offered, but the parties also offered medical testimony bearing upon the issue of permanent impairment, medical history and the causative aspects of claimant's thumb injury. Additionally, respondent offered two witnesses who testified concerning statements made by claimant about the source of his injury.

After considering all the evidence contained within the record, the ALJ concluded the claimant had failed to satisfy his burden of proof. The ALJ determined that credibility was "greatly at issue"<sup>4</sup> and the Board agrees.

The medical records and testimony show claimant provided several versions of the source of his thumb injury. The medical records from the emergency room reflect claimant associated his thumb complaints with attempting to catch a football. According to claimant, he intentionally misled the emergency room personnel because he wanted to ensure he received immediate treatment. He explained that he was afraid that treatment would be

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<sup>2</sup> Judge Steve J. Howard was originally assigned to this claim. The matter was later reassigned to Judge Frobish.

<sup>3</sup> ALJ Order (Dec. 14, 2001) at 1.

<sup>4</sup> Award at 2.

denied if he told them the injury was work-related. This reasoning is illogical under these circumstances.

During this period of time, claimant was in the process of receiving treatment for a work-related shoulder injury. He had counsel representing him in that claim and respondent was providing treatment for his injury. It makes no sense that he would think he needed to lie in order to receive treatment when he knew the process for obtaining treatment for industrial injuries.

Respondent also offered testimony from four witnesses who each heard claimant say that he hurt his thumb at home. This evidence is entirely consistent with the version of events claimant gave to the emergency room personnel.

Independent of that evidence, there is the testimony of Dr. Paul W. Toma. Dr. Toma testified that the mechanism of injury was most likely that of a traumatic event. He further testified that the type of thumb injury claimant sustained is typically called "game keeper's thumb" or "skier's thumb"<sup>5</sup>. And he added "[i]t's not called driller's thumb" and he has never seen anyone get this type of injury from a drill or screw gun.<sup>6</sup> While Dr. Prostic attributed claimant's injury to his work activities, he relied solely upon claimant's history. As discussed above, claimant's credibility has been significantly compromised.

Claimant requests the Board defer to Judge Howard's initial finding regarding claimant's credibility, thus favoring claimant over all the other witnesses, and suggests that the respondent's "hostile" working environment justified the initial finding of compensability. The Board finds there is no rational reason to accept Judge Howard's initial evaluation regarding credibility when that claim was presented to him at a preliminary hearing. He made his determination based upon the evidence available and presented at that time. Preliminary hearing determinations are merely that - preliminary. They are temporary in nature and always subject to a full hearing.<sup>7</sup> Since that initial hearing, the facts and circumstances have been further developed and explored by both parties and presented to the ALJ at the regular hearing. The Board's scope of review of the ALJ's decision is *de novo*.<sup>8</sup>

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<sup>5</sup> Toma Depo. at 10.

<sup>6</sup> Id. at 11 and 32.

<sup>7</sup> K.S.A. 44-534a(a)(2) (Furse 2000).

<sup>8</sup> K.S.A. 2001 Supp. 44-551(b)(1); K.S.A. 44-555c(a) (Furse 2000).

A claimant has the burden to persuade the trier of fact by a preponderance of the credible evidence that his or her position is more probably true than not.<sup>9</sup> In this instance, the ALJ who presided over the regular hearing and reviewed the entire record concluded claimant failed to meet that burden. The ALJ found, based upon all the evidence, claimant was not credible in his recitation about how he was injured. The Board agrees and finds no reason to disturb the ALJ's factual and legal findings. The Award is affirmed in all respects.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated June 5, 2003 is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Richard J. Liby, Attorney for Respondent and its Insurance Carrier  
Jon L. Frobish, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>9</sup> K.S.A. 2001 Supp. 44-508(g); see also, *Hughes v. Inland Container Corp.*, 247 Kan. 407, 410, 799 P.2d 1011 (1990).